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Supreme Court, U.S.
FILED
JAN 15 1999
CLERK

No. 98-874

In The

Supreme Court of the United States

October Term, 1998

ISKCON MIAMI, INC., a Florida nonprofit, religious corporation, and VERNE MEIS, an individual,

Petitioners,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and GARY DELLAPA, Aviation Director of Miami International Airport,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the commercial nature of the nation's airports has changed so dramatically in the six years since this Court decided *ISKCON v. Lee*, 505 U.S. 672 (1992), as to warrant reconsideration of the Court's decision that a typical modern airport is not a public forum?

2. Whether the First Amendment prevents an airport from prohibiting solicitation and sales involving the immediate receipt of money in order to prevent fraudulent and deceptive practices and interference with its passengers and other patrons?

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RESPONSE TO PETITION FOR CERTIORARI

Metropolitan Dade County (the County), files this brief in opposition to ISKCON Miami, Inc.'s and Verne Meis' (hereinafter referred to collectively as ISKCON) Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether the commercial nature of the nation's airports has changed so dramatically in the six years since this Court decided *ISKCON v. Lee*, 505 U.S. 672 (1992), as to warrant reconsideration of the Court's decision that a typical modern airport is not a public forum?

2. Whether the First Amendment prevents an airport from prohibiting solicitation and sales involving the immediate receipt of money in order to prevent fraudulent and deceptive practices and interference with its passengers and other patrons?

ORDINANCE INVOLVED

The Petition does not include all of the relevant portions of the ordinance involved in this case. Subsection (a) of Miami-Dade County Code § 25-2.2 has been included, but other relevant subsections, which are also the subject of this litigation have not. The additional relevant portions of § 25-2.2 provide:

> (c) The [Airport] Director shall have the authority to prescribe from time to time restrictions applicable to First Amendment

activities at the Airport. Such restrictions shall be subject to the requirements of subsection (d) and may include, but not be limited to, identifying specific locations of First Amendment zones in the Terminal Building and other Airport facilities, limiting the number of persons permitted in such zones, and providing a method for resolving conflicting requests for use of First Amendment zones.

(d) All restrictions prescribed by the Director shall be reasonable and appropriate, and made only after a finding by the Director that the restrictions are necessary to avoid injury, or the likelihood of injury, to persons or property, or to assure the safe and orderly use of the Airport facilities by the public.

* * *

(f) If the Director notifies the applicant that his application is denied, the County Attorney's office shall within five (5) days of such denial file an appropriate action in a court of competent jurisdiction and venue for a judicial determination as to whether the proposed activity described in the complaint may be prohibited, naming the applicant as a party defendant. Dade County shall exert every reasonable effort to have the issue heard on its merits without delay and as quickly as legally possible. The burden of showing that the proposed solicitation may be prohibited shall rest with the County.

(g) If the issue for judicial determination is not heard and decided on the merits by the

> court within ten (10) days from the date the complaint is filed, then the applicant shall be entitled to engage in the activities described in the application, subject only to those restrictions imposed on all other applicants as to time, place and manner of activities, so as to avoid injury to persons or property and to assure the safe and orderly use of the Airport facilities by the public. The applicant may continue to engage in such activities for so long as it may take to reach a final, nonappealed judicial determination. All parties shall thereupon abide by the ruling of such determination.

R-1-19-Exh. 2.

STATEMENT OF THE CASE

Because the Petitioners' statement does not fairly and completely reflect the record below, the Respondent offers the following supplemental information.

The County owns and operates the Miami International Airport (MIA). R-1-1-¶ 7. MIA is an international airport funded by user fees. R-1-19-Exh. 1 ¶¶ 3, 4. Most of the space at MIA is leased to commercial airlines, which pay fees to the airport in exchange for the use of its runways and other facilities. *Id.* The airlines are primarily responsible for the space they lease while the County is responsible for the remaining portions of the terminal building. *Id.*

In addition to the ticket counters of the various airlines, the MIA terminal contains concession stands, snack bars, duty-free shops, newsstands, pharmacies and other amenities. *Id.*; R-1-1-¶¶ 15-17. While the terminal is accessible to the general public, virtually all persons who visit do so for purposes related to air travel, including passengers, those meeting or seeing off passengers, flight crews and employees working in the terminal. R-1-19-Exh. 1 ¶ 5. ISKCON seeks access to MIA's main terminal for the purpose of soliciting donations, selling books and other religious items, and disseminating religious literature. R-1-1 ¶ 10. Although ISKCON and similar groups are permitted access to the terminal, their access is limited by ordinances of the County and rules adopted by the airport director. R-1-19-Exh. 2.

This action is directed primarily at the limitations imposed by County Code § 25-2.2(a), which prohibits solicitation for the immediate receipt of money. The County adopted those limitations in February of 1995, after this Court issued its decision in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (hereinafter *Lee*), upholding the New York/New Jersey Port Authority's ban on solicitation within its terminals. R-1-19-Exh. 1 ¶ 7. The ordinance was intended to address a series of problems MIA had experienced with solicitors, including ISKCON members, in the past. *Id.* When solicitation was permitted in the terminal, it regularly engendered complaints from airport patrons about overly aggressive solicitors, misrepresentations about the nature of the organization soliciting funds and intimidating tactics. *Id.* For example, several persons complained that solicitors wearing ISKCON identification badges told

them they were collecting for a drug rehabilitation program or for the homeless. *Id.* ISKCON does not run such programs and admitted it would be misleading to make such a representation. R-1-19-¶ 13. Other patrons complained that ISKCON members and perhaps others were pretending to be MIA officials and issuing citations for such non-existent infractions as "misuse of a camera" and "failure to smile." R-1-19-¶ 19.

One recurrent complaint about ISKCON members involved misrepresentations as to whether the books and pamphlets they were distributing were for sale or free. R-1-19-Exh. 1 ¶ 8. Some ISKCON members made a practice of handing books to airport visitors, indicating that the book was a gift. *Id.* When the visitor would begin to walk away, the ISKCON representative would demand payment. *Id.* Airport officials regularly received complaints from persons being hounded by ISKCON members after walking away with what they thought was a gift. *Id.*

MIA's officials tried to stem the misrepresentations and other improper tactics by efforts short of banning direct solicitation, but their attempts proved unsuccessful.[1] R-1-19-Exh. 1 ¶ 10. Before the ban, when airport officials learned of misrepresentations or other improper conduct, they would warn the offender and in some cases ask them to leave for the day. *Id.* It would have been difficult, if not impossible, to ever prosecute the persons

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[1] ISKCON itself claimed that it tried to stop such practices, but was unable to do so. R-1-19-¶ 13.

who engaged in such conduct, however, because the complaining parties, mostly travelers who were in the city for only a brief period, were generally unavailable as witnesses. *Id.*

Because less restrictive means did not work, the County decided to limit solicitation to ensure that passengers and other visitors were not interfered with unduly. R-1-19-Exh. 1 ¶ 11. The ordinance the County enacted does not completely forbid solicitation, however, as ISKCON suggests. *Id.* While the direct solicitation and receipt of funds at the airport is prohibited, organizations may still solicit donations by simply asking that the contribution be sent at a later time. *Id.* ¶ 12. Under the ordinance, ISKCON and other organizations are permitted to distribute literature and even to hand out preaddressed envelopes requesting that donations be sent directly to the organization. *Id.* Similarly, ISKCON can continue to sell its merchandise, *e.g.*, by signing up customers for purchases by mail order. ISKCON has decided not to exercise these options, because it believes they would not be as lucrative as in-person solicitation and sales. R-1-19-¶ 14. ISKCON is also free to lease retail space to sell its merchandise, but has never attempted to do so.

In addition to soliciting funds and selling merchandise, ISKCON also wishes to distribute free literature at MIA. R-1-¶¶ 5-6. MIA permits such activity, but restricts it to certain designated zones. R-1-19-Exh. 1 ¶ 12. These "First Amendment" zones are selected by MIA officials in an effort to ensure that interested persons have access to patrons, without interfering with airport operations, security or passenger flow. *Id.* Distribution is not allowed

in concourse areas where persons are required to pass through metal detectors and x-ray devices or in areas accessible only to international passengers who have not yet cleared customs. *Id.* For traffic flow purposes, zones are placed away from ticket counters and other places where lines may form. *Id.* The airport also tries not to place the zones directly in front of exits and entrances or in the middle of walkways where the flow of passengers could be disrupted. *Id.* The airport currently has eight zones, located throughout the terminal. *Id.* ¶ 13. Each of the zones is immediately adjacent to the flow of passenger traffic. *Id.* The vast majority of persons entering or exiting the terminal must walk near at least one of the zones. *Id.* Essentially the same zones have been in existence for nearly twenty years without complaint from ISKCON or others. *Id.*

The MIA does not permit solicitation or distribution of materials on the sidewalks outside the terminal. R-1-19-Exh. 1 ¶ 14. The sidewalks are narrow and extremely congested areas where passengers check their baggage at fixed booths, skycaps wheel carts full of luggage, conveyor belts are used to move baggage and packages, and taxis, vans and private vehicles drop off and pick up passengers. *Id.* Due to the layout of the airport, even a brief delay of persons in these areas can lead to extreme congestion and danger of an accident. *Id.* In addition, the sidewalks are constantly exposed to exhaust fumes and can become very hot and uncomfortable. *Id.*

ISKCON engaged an expert who looked at the airport on two occasions. R-2-29. He concluded that the existing zones were not the best that could be set aside for First Amendment activities. *Id.* MIA determined that the

change in zones suggested by the expert would unduly disrupt passenger traffic in front of its concourses. R-2-34-¶¶ 39, 40.

The parties filed cross-motions for summary judgment. The district court noted that the parties agreed there were no material facts in dispute and that resolution on summary judgment was therefore appropriate. R-2-48-5. The court determined that the County's regulations were indistinguishable from those upheld in *Lee* and granted summary judgment against ISKCON. R-2-48-6. ISKCON then appealed to the Eleventh Circuit. That court affirmed, rejecting ISKCON's argument that MIA is somehow unique among the country's airports and its contention that the County's regulations were unreasonable. The court explained that there is nothing unusual about MIA that makes it different from any other major airport. The court concluded the regulations were reasonable because they allow ISKCON to distribute its literature throughout the airport and even to solicit and sell merchandise. The only conduct the ordinance prohibits is the immediate receipt of money.

SUMMARY OF THE ARGUMENT

In *ISKCON v. Lee*, 505 U.S. 672 (1992), this Court held that airports are not public fora and may therefore ban solicitation for the immediate receipt of funds. Miami-Dade County passed regulations in 1995 designed expressly to comply with the Supreme Court's ruling. Like the regulations approved in *Lee*, the County's regulations prohibit solicitation for the immediate receipt of

funds, but permit solicitation for donations to be made at a later time. The regulations also permit sales if they do not require immediate payment. The County's regulations, like those in *Lee*, are a content-neutral regulation of an activity associated with speech – the receipt of money. The regulations are a reasonable response to years of fraud and abuse by solicitors, including members of ISKCON, at the airport.

ISKCON asks the Court to revisit the *Lee* decision because "the function, purpose, and design of airport terminals has changed dramatically" since that case was decided in 1992. *Petition for Certiorari* at 12. ISKCON argues that MIA is highly commercialized, but as this Court noted in *Lee*, so are all modern airports. The nation's airports were highly commercialized long before 1992, as this Court recognized in *Lee*, and nothing has changed significantly since then to warrant reconsideration of that opinion.

As this Court explained in *Lee*, since modern airports are not public fora, they need not show that their regulations of speech are narrowly tailored, only that they are reasonable. ISKCON argues that the County's regulations are not reasonable because they do not leave them an adequate alternative channel to solicit airport patrons and sell their merchandise. Their argument misconstrues the regulations. MIA prohibits only solicitation for the immediate receipt of funds. ISKCON continues to be free to express its views in the MIA terminal and even to solicit donations. The only thing it is prohibited from doing is receiving funds at the airport. Properly understood, the regulations do not restrict speech at all – only the ability to collect money on the spot from harried

airport patrons. If ISKCON wishes to sell or solicit at the airport, it may do so by simply asking patrons to make their purchases or contributions at a later time, for example by distributing envelopes to be returned after the patron has had a chance to consider ISKCON's solicitation or sales pitch. ISKCON protests that this alternative will not bring in as much money as face-to-face requests for donations and sales, but a regulation does not become unreasonable simply because it makes the collection of money more difficult. The speech aspects of ISKCON's solicitation efforts are fully protected by the existing regulations. If ISKCON is more concerned about sales than speech, it is free to sell its merchandise on the same terms as anyone else at the airport – by leasing space.

REASONS FOR DENYING THE PETITION

I.

THIS COURT RESOLVED THE PRINCIPAL ISSUE RAISED BY THE PETITION, WHETHER A MODERN AIRPORT IS A PUBLIC FORUM, IN *ISKCON V. LEE*, AND THE NATURE OF THE NATION'S AIRPORTS HAS NOT CHANGED SIGNIFICANTLY IN THE SIX YEARS SINCE THAT DECISION.

In *ISKCON v. Lee*, 505 U.S. 672 (1992), this Court held that an airport is not a public forum. Airports are built to facilitate air travel, not to create public venues for speech activities:

> Airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel. . . . Although many airports have expanded their function beyond

> merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standard we have previously set out for identifying a public forum.

505 U.S. at 682-83 (citations omitted).

The Court went to considerable lengths to make clear that its opinion applied to all major airports, not just the New York/New Jersey Port Authority (the "Port Authority") at issue in that case. As this Court noted, the Port Authority's terminals "are far from atypical." 505 U.S. at 682. The Court was careful to point out that *all* modern "airports are commercial establishments funded by users' fees and designed to make a regulated profit, . . . where nearly all who visit do so for some travel-related purpose." 505 U.S. at 682. Like every other major airport in the nation, the Port Authority leased space to commercial tenants to provide the services the traveling public expects. *Id.*

ISKCON has tried valiantly in this litigation to show that MIA is somehow different from other airports, but the lower courts found no factual support for its contention. As the Eleventh Circuit explained:

> Although MIA might serve a number of commercial and other purposes, *see id.* at 688-89, 112 S.Ct. 2701 (O'Connor, J., concurring), the main or primary purpose of the airport is to facilitate air travel, *id.* at 682, 112 S.Ct. 2701 (majority opinion). Contrary to ISKCON's assertion that MIA differs from the New York airports in ways

> that render MIA a public forum, *Lee*'s determination that airports are not public fora was not limited to the particular airports at issue, but constituted a categorical determination about airport terminals generally. *See Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 662 (8th Cir.1997); *Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1156 (7th Cir.1995); *Multimedia Publ'g Co. of S.C. v. Greensville-Spartanburg Airport Dist.*, 991 F.2d 154, 158-59 (4th Cir.1993). ***ISKCON has failed to point to any unique feature of MIA that distinguishes it from other airports in general.***

147 F.3d at 1288; *Pet. App.* 10-11(emphasis added).[2]

ISKCON stresses that MIA has numerous commercial tenants at the airport, selling a variety of retail goods, but this is equally true of the Port Authority and every other major airport in the nation. The Port Authority, like MIA, houses restaurants, offices, clothing stores, and art exhibits, as well as two branches of Bloomingdales. 505 U.S. at 688. As Justice O'Connor put it, the Port Authority was "operating a shopping mall as well as an airport." 505 U.S. at 689. Nevertheless, even considering the functions other than those directly related to travel, "[f]ace to face solicitation is incompatible with the airport's functioning." *Id.*

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[2] To the extent ISKCON is right that MIA is unique among the nation's airports, it offers yet another reason for denying the petition. This Court need not get involved in the resolution of a case that applies to only one of the nation's hundreds of airports.

There have been no changes, dramatic or otherwise, in the way airports are run since 1992 to warrant reconsideration of this Court's decision in *Lee* that the nation's airports are not public fora. The various newspaper and magazine articles ISKCON cites for the proposition that airports are becoming increasingly commercialized report a trend that began long before 1992, not a development that first surfaced in the last six years. In fact, ISKCON made the exact same argument about the commercial nature of the nation's airports in *Lee*, relying on the same and similar articles. *See Brief of Petitioner, ISKCON v. Lee*, 1992 W.L. 526162 (1992), at 29-31.[3] In that brief, written in February 1992, ISKCON argued, as it does here, that the terminals of "airports nationwide, are vital thoroughfares," that "they contain appurtenances and services like those in urban commercial areas, including lobbies, office space, concessions, newsstands, restaurants, and government management facilities," and that this " 'striking trend' has transformed the terminal concourse into 'Main Street U.S.A.' " *Id.* at 30 (citing E. Knevals, *The Airport: Second City* (1967) at 3 and articles listed in footnote 3 above).

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[3] Many of the articles ISKCON cites in this case were written *before* 1992 and were cited in ISKCON's brief in *Lee*. *See, e.g.*, L. McGinley, *Airports Try to Ease the Pain of Waiting With New Ways to Spend Money*, Wall St.J., Aug. 21, 1990; G. Irsfeld, *Airports Use Art to Enhance Terminals, Community Relations*, Airport Serv. (May 1989); S. Carmicael, *Stuck at the Airport? Then Look at the Art*, N.Y. Times (Dec. 15, 1991), Sec. 5 (Travel) at 8; *Winged Victories*, Architectural Rec. (June 1989), at 130; G.F. Doughty, *Review of Passenger Service Issues in Airports for People* (1988).

The Court was fully apprised of the commercial nature of the nation's airports before it decided *Lee*. The Court's conclusion that the nation's airports are not public fora, notwithstanding their extensive commercial activities, was correct in 1992 and it is equally correct today.

II.

THE LOWER COURTS CORRECTLY HELD THAT THE COUNTY'S REGULATIONS OF SOLICITATION AND SALES AT MIA ARE REASONABLE.

Since airports are not public fora, an airport's restrictions on speech "need only satisfy a requirement of reasonableness." *Lee*, 505 U.S. at 683. Applying the reasonableness standard, the Court concluded there was "no doubt" the Port Authority's "prohibition on solicitation passes muster." *Id.* The Court explained that while solicitation is a form of speech, which deserves some measure of protection, it is different in kind from other forms of speech and is therefore subject to greater restrictions:

> We have on many prior occasions noted the disruptive effect that solicitation may have on business. 'Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.' *Kokinda, supra* at ___, 110 S. Ct. at 3123. *See Heffron*, 452 U.S. at 663, 101 S. Ct. at 2572 (Blackmun, J., concurring in part and dissenting in

part). Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. *Id.* at 653, 101 S. Ct. at 2566-2567. This is especially so in an airport, where 'air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation.' 925 F.2d at 582. Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.

In addition, face to face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. *See e.g., International Society for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 159-163 (N.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d 430 (CA 2 1981). The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. 506 F. Supp. at 159-163. *See* 45 Fed. Reg. 35314-35315 (1980). Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

505 U.S. at 683. These are the precise considerations that went into the County's decision to regulate solicitation and sales in the MIA terminal.

Like MIA's, the Port Authority's regulations cover both solicitation and sales, but the Court did not directly address the issue of sales, other than to hold generally that the regulations were constitutional. "Notwithstanding the ambiguous nature of this aspect of the Court's holding," the Eleventh Circuit concluded, "based on the various opinions and statements in *Lee* and in other Supreme Court decisions, that the same problems that justify a governmental restriction on solicitation in a nonpublic forum may render a similar prohibition on the sale of literature reasonable." 147 F.3d at 1287; *Pet. App.* at 8. In upholding the Port Authority's regulation of solicitation, the Court "focused on the inconvenience, disruption, and intrusion associated with the act of engaging in the immediate exchange of money with passersby, in contrast to merely handing them literature." *Id.* The same concerns apply to face to face sales: "The sale of literature similarly requires that the person asked to buy stop, listen to the sales pitch, contemplate the item offered for sale, and then act to make the purchase." *Id.*

As the Eleventh Circuit noted, this Court's previous opinions have generally treated sales and solicitations equally for purposes of determining the reasonableness of a government's regulations of speech in a nonpublic forum. *See, e.g. Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 665 (1981) (Blackmun, J., concurring in part and dissenting in part) ("[C]ommonsense differences between literature distribution, on the one hand, and *solicitation and sales*, on the other, suggest

that the latter activities present greater crowd control problems than the former.") (emphasis added); *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion) (upholding Postal Service's regulations prohibiting sales of merchandise as well as the solicitation of contributions on postal property, including surrounding sidewalks). As the lower courts found, the County's regulations of direct sales in the airport went no further than reasonable to prevent undue interference with MIA's patrons.

III.

THE LOWER COURTS CORRECTLY HELD THAT THE COUNTY'S REGULATIONS ALLOW ISKCON MEANINGFUL ALTERNATIVE ACCESS TO EXPRESS ITS VIEWS.

Finally, ISKCON argues that the County's regulations do not leave open adequate alternative channels of communication. Like the regulations considered in *Lee*, however, the County's regulations do not prohibit all solicitation, only solicitation for the immediate receipt of funds. Nor has ISKCON been prevented from selling its merchandise; it may do so, for example, by offering sales by mail order. If ISKCON prefers to complete its sales at the airport, it may do so on the same terms as anyone else selling merchandise at MIA – by leasing space.

Because MIA is not a public forum, the County is not required to prove that less intrusive means would be as effective as its existing limitations on solicitation and sales. *Lee*, 505 U.S. at 683; *Kokinda*, 497 U.S. at 730. As this Court held in *Lee*, absent a flat ban, an airport would face

"considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to ensure that travelers are not interfered with unduly." 505 U.S. at 684. *See also One World, One Family Now v. Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (Flat ban on the sale of merchandise in city streets, a traditional public forum, was lawful even though the regulation was not the least restrictive or least intrusive alternative), *cert. denied*, 117 S. Ct. 554 (1997). Like the restriction upheld in *Lee*, MIA's restriction on solicitation "is directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation. In other words, the regulation permits expression that solicits funds, but limits the manner of the expression to forms other than the immediate receipt of money." 505 U.S. at 705 (Kennedy, J. concurring). Since the regulation does not completely ban all forms of solicitation, it survives not only the reasonableness rule applicable to non-public forums, but the Supreme Court's test for speech restrictions in a public forum as well. *Id.*

ISKCON complains that allowing them to solicit, but not to receive funds immediately, is unreasonable because it is not likely to be as lucrative as soliciting and receiving funds on the spot. ISKCON appears to be more concerned with the profitability of their sales than with the expression of their views. As one court recently noted, however: "Raising money is not a First Amendment concern. . . . The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element." *Friends of the Vietnam Veterans' Memorial v. Kennedy*, 116

F.3d 495, 497 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1035 (1998). It is the expression, not the collection of money *per se*, that is protected. ISKCON has no First Amendment right to demand that the County allow them free access to a nonpublic forum so that they can collect money in what they consider to be the most effective manner.

ISKCON's contention that it must be allowed access to the terminal, without cost, to *sell* its merchandise ignores this Court's decision in *Heffron*, 452 U.S. 640. As here, in that case ISKCON argued that a state rule restricting its solicitation and sales at a nonpublic forum was unreasonable because it did not leave open adequate alternative avenues of communication. The rule limited sales and solicitations at a state fair to fixed booths for a fee. This Court upheld the rule, explaining:

> First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. *The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself.*

Id. at 655-56 (emphasis added). Similarly, here, the County's regulations do not prevent ISKCON from practicing Sankirtan anywhere outside the airport. More importantly, the regulations do not prevent ISKCON from selling its merchandise *in* the airport. If it wishes to

engage in sales, ISKCON need only lease space, like anyone else who wishes to sell merchandise. *See Lubavitch v, City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (Government provided adequate alternative means of communication by allowing plaintiffs to sell their goods "in the same manner as anyone else – by leasing space.").

ISKCON is not entitled to a special exemption that allows them and no one else to make sales without renting space. As this Court stated in *Heffron*, "the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, *sell, or solicit* if the booth rule may not be enforced with respect to ISKCON." 452 U.S. at 655. (emphasis added). "Looked at in this way, it is quite improbable that the alternative means suggested by [ISKCON] would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present" in the airport if ISKCON is allowed to sell its wares in the terminal without leasing space. *Id.* at 652. *See also, Lee* 505 U.S. at 685; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (regulations should not be judged solely by reference to the plaintiff's proposed activities, but on the basis of the effect of allowing all others to engage in similar conduct). If portions of the MIA terminal are made available for ISKCON to sell its religious merchandise, they must be made equally available to other groups, compounding the problems of passenger congestion, fraud and duress that the current restrictions are meant to solve.

As the lower courts noted, the only other distinction between this case and *Lee* is that the MIA regulations prohibit solicitation on its sidewalks while the Port

Authority's regulations applied only to the interior of the terminal. This difference is constitutionally insignificant. The limitation on solicitation on the sidewalk is, if anything, even more reasonable than the limitation on solicitation within the terminal. Certainly the concerns about interfering with travelers, fraud and misrepresentation apply as much to the sidewalk as to the interior of the terminal. The sidewalk at MIA is particularly ill-suited for sales and solicitation. It is extremely narrow, filled with luggage, carts, porters and conveyors, and directly accessible to cars, taxis and vans.

Moreover, the existence of alternative areas of access is but one factor in the determination of whether a government's regulation of speech in a nonpublic forum is reasonable. For example, in *Kokinda* this Court upheld similar regulations banning sales and solicitations from *anywhere* on postal property, including not only the interior of postal offices, but the sidewalks surrounding the offices as well. 497 U.S. at 735 (plurality opinion). "Like the sidewalks adjoining the post office at issue in *Kokinda*, the sidewalks and parking lots adjacent to the Miami airport terminals are nonpublic fora; the sidewalks and parking lots are intended by the County to be used for air travel-related purposes, 'not to facilitate the daily commerce and life of the neighborhood or city.' " 147 F.3d at 1289, *Pet. App.* at 14-15 (quoting from *Kokinda*, 497 U.S. at 728). Again, the County's regulations do not totally prohibit solicitation or sales of literature. The regulations only ban solicitation and sales accompanied by the immediate receipt of funds. "Thus, ISKCON is still free both to solicit funds in the airport by pamphleteering and asking travelers to mail in their contributions, and to offer their

literature for sale through mail order or in other locations." 147 F.3d at 1290, *Pet. App.* at 15. While these alternatives may be less effective than ISKCON would prefer, they are not constitutionally unreasonable.

CONCLUSION

This Court held in *Lee* that an airport is not a public forum and that it may therefore ban face-to-face solicitation for the immediate receipt of funds. The County's regulations are largely identical to those upheld in *Lee*. ISKCON's members continue to be able to express their views throughout the airport. They are required only to remain within designated zones and refrain from accepting money directly. These restrictions meet the test of reasonableness set forth in *Lee*. Nothing has changed about the nature of the nation's airports since 1992 to warrant reconsideration of *Lee*. Accordingly, the County

respectfully submits that the petition for certiorari should be denied.

Dated: January 15, 1999

Respectfully submitted,

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